Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/08416/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 14 September 2018	**On 5 October 2018**

Before

UPPER TRIBUNAL JUDGE BLUM

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

AMADOU [K]
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Ms A Everett, Senior Home Office Presenting Officer
For the Respondent: no legal representative (the claimant's partner appeared on his behalf)

DECISION AND REASONS

1. This is an appeal by the Secretary of State for the Home Department (SSHD) against the decision of Judge of the First-tier Tribunal Devittie (the judge), promulgated on 26 January 2018, allowing the appeal of Mr [K] (hereafter claimant) against the SSHD's decision, dated 7 March 2016, refusing the claimant's human rights claim.

Background

2. The claimant is a national of Gambia, date of birth 10 October 1969. He has had an 'on and off' relationship with [MG], a British citizen, since 1993. He lawfully entered the UK on 2 June 1994 and was granted a further period of leave to remain, first as a working holidaymaker, then as a student, until 31 March 1998. On 30 November 1996 the claimant received a caution for forging a document and using a vehicle without a test certificate. In January 1998 the claimant married [AKM] (wrongly identified by the judge as Kathleen) a British citizen and, on 23 March 1998, applied for leave to remain as her spouse. The claimant and [AKM] had a son born on 17 March 1996 and a daughter born on 19 February 1999.

3. On 17 August 1998 the claimant was convicted of an offence of possessing a controlled Class A drug with intent to supply and sentenced to 2 years imprisonment.

4. [K], the son of the appellant and [MG] was born in February 2000. He would have been conceived around May 1999. In October 2000 the claimant returned to Gambia.

5. According to the Reasons For Refusal Letter the claimant then made an application for leave to enter to join his spouse, which was refused on 6 December 2001 and an appeal dismissed on 3 September 2004. The Reasons For Refusal Letter however also states that the claimant entered the UK on 12 February 2002 pursuant to a grant of entry clearance on the basis of his marriage to [AKM]. It is unclear to me how this entry clearance was granted or why the claimant proceeded to appeal against the earlier refusal to grant entry clearance. In any event, the applicant applied for Indefinite Leave to Remain (ILR) on the basis of his relationship with [AKM] on 17 January 2003. [O], his daughter from his relationship with [MG] was born in December 2002. [O] would have been conceived around March 2002, soon after the claimant entered the UK pursuant to his relationship with [AKM]. The claimant as granted ILR on 20 January 2003.

6. On 27 February 2004 the claimant was sentenced to 3 years imprisonment for possessing a Class A drug (198 tablets of Ecstasy) with intent to supply.

7. On 30 March 2005 the claimant was notified of his liability to deportation and, on either 14 or 18 April 2005, he was notified of a decision to make a deportation order. An appeal against this decision was dismissed by Immigration Judge Grant in a decision promulgated on 19 July 2005. The appeal was based, inter alia, on the claimant's relationship with [MG] and their two children who, at that time, had no right to remain in the UK and who were seeking ILR under the terms of a Home Office amnesty. Neither the claimant's then wife, nor [MG] attended the appeal hearing. Judge Grant found that letters from [MG] and from [AKM] had been fabricated and concluded that the claimant was not in a relationship with either of them or with their

children. Judge Grant also found that the claimant attempted to downplay his involvement in the 2004 conviction.

8. On 16 September 2005 a deportation order was made against the claimant. He voluntarily left the UK on 2 March 2007.

9. The claimant's marriage to his British citizen wife was dissolved on 15 April 2008. The claimant is said to have rekindled his relationship with [MG] in 2008 and they got married in Gambia on 8 April 2013.

10. On 27 July 2015 representations were made on the claimant's behalf to revoke the deportation order. In his decision refusing to revoke the deportation order, which was also treated as a refusal of a human rights claim, the respondent considered that the offences committed by the claimant were very serious and that the public interest required his continued exclusion. The respondent noted the passage of time and the assertion that the claimant was now a reformed person, his remorse and his wish to be reunited with his children. The respondent was however concerns that, if the claimant committed further offences, the consequences would be serious and referred to an absence of evidence that he had rehabilitated and was now a low risk of offending. The respondent was not satisfied the claimant had a genuine and subsisting parental relationship with his two children by [MG] and found that he could maintain contact by remote forms of communication. The respondent did not believe it would be unduly harsh for the children to either relocate to Gambia, or to be separated from the claimant. Nor was the respondent satisfied that the claimant's continued exclusion from the UK would have an unduly harsh impact on [MG]. The respondent concluded that there were no very compelling circumstances which rendered the refusal of the human rights claim disproportionate under Art 8.

The First-tier Tribunal decision

11. The judge summarised the Reasons For Refusal Letter, and summarised the claimant's statement, in which he indicated that he had now been separated from his wife and children for 10 years and that this separation was adversely affecting his children, and his youngest son in particular, who was having difficulties in school. The claimant stated that he had spent the previous 13 years of his life rebuilding and rehabilitating himself and to this end had established businesses in Gambia and had not committed any offence since 2004. The judge summarised [MG]'s statement and heard oral evidence from her and from their two children. [MG] stated that, since the claimant left the UK, their family had been torn apart and that she constantly struggled to raise her children without the support of their father. She visited the claimant on a number of occasions with their children the last time being in 2013. The judge referred to several documents including letters written to the claimant by his son and daughter between 2015 and 2017, evidence of his businesses in

Gambia including invoices, registration documents and insurance documents, and character references. The judge set out the relevant provisions of paragraph 398 and 399 of the immigration rules, and noted that the questions on which the appeal turned were whether the claimant had a genuine and subsisting parental relationship with his British children, and whether it would be unduly harsh for the children to remain in the UK without their father.

12. At [9] the judge concluded that the claimant did have a genuine and subsisting relationship with his children, referring to the letters from the children and the evidence from them and their mother. There has been no challenge to this aspect of the judge's decision.

13. At [10] the judge stated,

> "In the letters they submitted with the application and at this hearing as well as in their oral evidence, both children were eloquent in their plea to have their father join them in the UK. His daughter could barely disguise her emotions in her oral evidence. She is aged 13. I have no reason to doubt the evidence of the mother that her son in particular has been badly affected by his father's absence. As I say both children gave evidence at this hearing and were cross-examined. In my opinion no question arises as to their evidence having been in any way contrived. The indications are that his daughter is well focused and has a clear goal of what she seeks to achieve in life. Less so with his son. I find that the involvement of their father in their lives even at this stage in the growing up will go a long way in assuaging the pain they expressed in having an absent father. The best interests of the children therefore support the [claimant's] return. I accept that their mother has ably cared for them but I do not accept that they do not continue to suffer emotional distress because of their father's absence."

14. Then at [11] the judge stated,

> "There are strong public interest factors that stand against the revocation. The [claimant] was convicted of a serious offence whose gravity is made plain in the sentencing remarks of the trial court. I also recognise, that even if the risk of reoffending is low, that the [claimant's] deportation meets the expectation of the public that foreign criminals who commit serious offences will face deportation. His deportation also serves to deter like-minded foreign persons."

15. The judge then found that the likelihood of the claimant reoffending was low. In reaching this finding the judge referred to and relied on the claimant's voluntary departure from the UK and the positive steps taken by claimant in his 10-year period of absence from the UK. The judge found that the voluntary nature of the claimant's return was indicative of a genuine acceptance and willingness to face up to the consequences of his action. The judge additionally indicated that he had closely examined the documentary evidence which showed that

the claimant had engaged in lawful self-employment in Gambia during his tenure absence. The judge found that this demonstrated much initiative on the claimant's part in taking rehabilitative action. The judge stated,

> "… this is an [claimant] who been [sic] endure the pain of a 10-year separation from his children, with no small measure of self-discipline. It is not probable in my view that he would, after such an experience, re-engage in criminal activity and place and risk the best interests of his children at so critical a juncture in their lives."

16. The judge consequently concluded that it would be unduly harsh to expect the children to remain in the UK and exclude their father from the UK beyond the 10-year period. The appeal was allowed.

The grounds of appeal, the grant of permission and the parties' submissions

17. The grounds contend that the judge failed to identify anything exceptional about the family situation that would outweigh the compelling public interest in the claimant's continued exclusion. The grounds contend that the judge went against relevant jurisprudence when stating that the best interests of his children 'required' the claimant's return. I pause to note that the judge did not state that the best interests of his children 'required' his return but rather that the best interests of his children 'supported' his return. The grounds contend that there was nothing exceptional in this case and that there was no expert evidence of any difficulties suffered by the family that might take the case out of the ordinary and no expert evidence to support the judge's finding that the claimant's likelihood of reoffending was low. The grounds further contend that the judge did not appear to have undertaken any balancing exercise weighing up the best interests of the children with the claimant's criminal background or public interest in the deportation of foreign criminals, and in so doing the judge failed to correctly apply the substantial weight that should be attached to the public interest.

18. In granting permission judge of the First-tier Tribunal Shimmin found it arguable that the judge erred in failing to identify anything exceptional about the situation of the claimant and his family that would outweigh the compelling public interest in his continued exclusion and that he had not correctly assessed the facts and law in respect of the best interests of the claimant's children. It was additionally arguable that the judge made a decision that there was a low risk of reoffending without any evidential basis and that the judge failed to balance correctly the facts against the public interest in the continued exclusion of the claimant.

19. Ms Everett relied on the grounds of appeal and the grant of permission and submitted that there was no adequate assessment of

the public interest. She submitted that the judge's reliance on the evidence relating to the claimant's businesses in Gambia and the other documents he provided were somewhat speculative and that the judge did not adequately assess the seriousness of the claimant's criminality concluding that the impact on the children would be unduly harsh.

20. I reserved my decision.

Discussion

21. In **MM (Uganda) & Anor v Secretary of State for the Home Department** [2016] EWCA Civ 617 the Court of Appeal considered the approach to determining undue harshness in the context of s.117C(5) and paragraph 399 of the immigration rules. The Court found that the wider public interest factors had to be considered when determining the issue of undue harshness, including an applicant's immigration and criminal history. The question of undue hardship had to have regard to the force of the public interest in deportation in the particular case. Laws LJ stated, at paragraph 24, "*What is due or undue depends on all the circumstances, not merely the impact on the child or partner in the given case. In the present context relevant circumstances certainly include the criminal's immigration and criminal history*." This approach was followed in **MA (Pakistan) & Ors, R (on the application of) v Upper Tribunal (Immigration and Asylum Chamber) & Anor** [2016] EWCA Civ 705, albeit with some reluctance.

22. The headnote of **Smith (paragraph 391(a) – revocation of deportation order)** [2017] UKUT 00166(IAC) reads,

> *"(i) In cases involving convictions for an offence for which the person was sentenced to a period of imprisonment of less than 4 years, the Secretary of State's policy, as expressed in paragraph 391(a) of the Immigration Rules, is that the public interest does not require continuation of a deportation order after a period of ten years has elapsed.*
>
> *(ii) However, paragraph 391(a) allows the Secretary of State to consider on a case by case basis whether a deportation order should be maintained. The mere fact of past convictions is unlikely to be sufficient to maintain an order if the 'prescribed period' has elapsed. Strong public policy reasons would be needed to justify continuing an order in such circumstances.*
>
> *(iii) Paragraph 391(a) will only be engaged in a 'post-deportation' case if the person is applying for revocation of the order from outside the UK. Nothing in the strict wording of the rule requires the ten-year period to be spent outside the UK. However, the main purpose of deportation is to exclude a person from the UK. Any breach of the deportation order is likely to be a strong public policy ground for maintaining the order even though a period of ten years has elapsed since it was made.*

> *(iv) In 'post-deportation' applications involving sentences of less than four years made before the end of the ten-year period, and 'post-deportation' applications involving sentences of four years or more, appropriate weight should be given to the Secretary of State's policy as expressed in the 'Conventions exception' and 'sweep-up exception' with reference to paragraphs 398-399A and 390A of the Immigration Rules."*

23. Having considered the aforementioned decisions, it is apparent that, when assessing the issue of undue harshness, a judge must take account of relevant public interest factors including an applicant's immigration and criminal history. A judge must also take into account the provisions of paragraph 391 of the immigration rules.

24. I can detect no error of law in the judge's assessment of the best interests of the claimant's two children. The judge did not approach their best interests as a paramount consideration or as a trump card. The judge heard oral evidence from both children and explained, with reference to their evidence and their circumstances, why it was in their best interests to be reunited with their father. This is not a surprising conclusion. The judge was unarguably entitled to conclude, given in particular the young age of the claimant's daughter and the length of separation, and the difficulties the claimant's son was experiencing at school, that the children's best interests supported his return.

25. Nor am I satisfied that the judge failed to take full account of the public interest factors at play in his balancing exercise when assessing the issue of undue hardship. The judge was clearly aware of the claimant's criminal history as this was set out at [2], and the judge again set out the public interest considerations at [6] as detailed in the Reasons For Refusal Letter. Then at [11] the judge directed himself to the strong public interest factors that stood against the revocation of the deportation order. Although the judge did not specifically refer to paragraph 391(a) of the immigration rules it is apparent that the judge took into account the 10 years that elapsed from the making of the deportation order and the fact that the claimant voluntarily left the UK and had now been separated from his family for over 10 years. These were relevant factors when assessing undue hardship.

26. I do not accept the submission made on behalf of the SSHD that the judge was not entitled to rely on the documentary evidence produced by the claimant, which related to his circumstances in Gambia in the 10 years following his voluntary departure, in concluding that the claimant was now at low risk of re-offending. No issue was taken with the authenticity or reliability of the various documents either in the Reasons For Refusal Letter or at the hearing before the First-tier Tribunal. The judge was rationally entitled to conclude that the businesses established by the claimant indicated initiative on his part in taking rehabilitative action and that it was no small measure of

self-discipline. The documents included a certificate of character issued by the Gambian Police Force indicating that the claimant had not been convicted of a felony or misdemeanour in the country. The SSHD's contention that the judge's assessment of this documentary evidence was unduly speculative amounts to no more than a disagreement with factual conclusions rationally open to the judge for the reasons he gave.

27. I do not accept that the judge failed to identify matters that were 'exceptional' or which took the case 'out of the ordinary' such that the impact on the children was unduly harsh. The judge heard evidence from the children and [MG] and was entitled to conclude that the children suffered emotional distress because of their father's absence, and the judge was also entitled to take into account, when determining undue harshness, the claimant's voluntary return to Gambia and the passing of 10 years since the making of the deportation order and the passing of 10 years since his departure from the UK. The judge approached these factors holistically, taking account of the seriousness of the claimant's offending but also taking account of his findings that the claimant was at low risk of committing further offences. I find the judge was lawfully entitled to conclude that the claimant's continued exclusion from the UK was having an unduly harsh impact on his children given his particular immigration history and history of offending.

Notice of Decision

The First-tier Tribunal judge did not erred in law. The SSHD appeal is dismissed.

1 October 2018

Signed Date

Upper Tribunal Judge Blum